SINGAPORE REPORTS

THE "BENOI VI" SINDO TIMBER ENTERPRISES (PTE.) LTD. v. "BENOI VI" (OWNERS & ORS.)

[O.C.J. (Sinnathuray J.) April 9, 1979]
[Singapore — Admiralty in Rem No. 44 of 1974]

Practice & Procedure — Pleadings — Amendments — Delay — Injustice.

This was an application at the hearing of the action for amendments of the Statement of Claim filed by the plaintiffs on June 23, 1975. The defence was filed on January 8, 1976. The summons for directions was taken out on March 19, 1976 and discovery was had on June 9, 1976. Thereafter nothing happened. Counsel for the defendants strongly objected to these amendments and said that grave injustice would be done to his client if those amendments were allowed.

Held: the plaintiff who commenced the action had had the conduct of the action. He set the timing of the action. He called the tune. The court's duty then was to weigh which party would suffer graver injustice. In the circumstances of this case it was obvious that graver injustice would be suffered by the defendants if the amendments were allowed. The amendments were therefore denied.

APPLICATION.

Loh Boon Huat for the plaintiffs.

Cheong Yuen Hee (*Roy Chua* with him) for the 2nd defendants.

Sinnathuray J. (delivering oral judgment): This is an application, at the hearing of the action, for amendments of the statement of claim filed by the plaintiffs on June 23, 1975. The defence was filed on January 8, 1976. The summons for directions was taken out on March 19, 1976, and discovery was had on June 9, 1976. Thereafter nothing happened.

This morning counsel for the plaintiffs seeks to amend paragraph 8(b) of the statement of claim which sets out new and further particulars of negligence alleged against the defendants, and he further seeks to amend paragraph 10 thereof by an insertion of a new sub-paragraph which states substantially the same new further particulars set out in the amended paragraph 8(b). Counsel for the plaintiffs gave notice of these amendments to the solicitors for the defendants last Friday. The submission is that these amendments are necessary as they go to the root of the case, and that it is in the interest of justice that I should allow these amendments.

The cause of action arose on March 20, 1973. Seven days later the plaintiffs caused to be obtained a surveyor's report on the damaged vessel. Given a reasonable time, certainly in 1973 itself, long before the statement of claim was filed, the plaintiffs would have had the particulars of the damage to the barge. But in the statement of claim the plaintiffs alleged that they "are unable to give full particulars until discovery". That is to be found in paragraphs 8 and 10 of the statement of claim. Be that as it may, as I have just said, discovery was had on June 9, 1976. So then, for nearly three years after discovery, nothing was done. Indeed, nothing was done even after the dates were assigned for the hearing of the case, which was two months ago.

Mr. Cheong, counsel for the defendants, strongly objects to these amendments. He says that the second defendants sold the vessel, the barge, in the beginning of 1974, that the evidence is no longer available to the second defendants, that is to say, the second defendants have no opportunity to inspect the vessel relating to the allegations in the amended paragraph 8(b) and the new sub-paragraph in paragraph 10. The proposed amendments state that the stanchions on the starboard side of the vessel were inadequate in number and in strength and were placed too far apart and/or the sockets for the stanchions were not adequately or efficiently or correctly welded onto the vessel and were not of sufficient height and strength to support the stanchions and/or the bracings were not of sufficient height and strength and were not correctly or efficiently or adequately welded onto the vessel to support the stanchions to withstand the contemplated voyage. Counsel for the defendants says grave injustice will be done to his client if these amendments are allowed.

So then, both sides allege that there would be injustice. Admittedly, injustice there is going to be. But then, the plaintiff who commenced the action has had the conduct of the action. He sets the timing of the action. He calls the tune. My duty now is to weigh which party will suffer graver injustice. In my judgment it is obvious that graver injustice will be suffered by the defendants if the amendments are allowed. The amendments are denied.

Application disallowed.

Solicitors: *Donaldson & Burkinshaw; Chua, Hay & Wee.*

THE "VISHVA PRATIBHA"; SARATHI CO. v. "VISHVA PRATIBHA" (OWNERS OF); PORT OF BOMBAY, INDIA

[O.C.J. (Sinnathuray J.) April 18, 1980]
[Singapore — Admiralty in Rem No. 275 of 1974]

Shipping Law — Carriage of Goods — Limitation liability of £100 — Meaning of "£100 gold" — Carriage of Goods by Sea Act (Cap. 184), arts. IV r.5 and IX.

The plaintiffs in this case claimed damages from the defendants, the owners of the ship "Vishva Pratibha" of the Port of Bombay, India, for breach of contract and/or negligence in the carriage of 31 packages of handloom cotton lungies of the plaintiffs on board the said ship under a bill of lading of November 26, 1973 from Madras to Singapore.

At the hearing, the defendants admitted liability for 16 packages. As to 14 of them, they claimed limitation of liability of £100 sterling each under the Carriage of Goods by Sea Act (Cap. 184). As to the remaining two packages, the parties were agreed in the equivalent of Singapore dollars of Indian R. 1,737.25 as the damages to the packages were below the limit of liability under the Act.

The plaintiffs by reference to Article IX of the Carriage of Goods by Sea Act contended that it meant "£100 gold". They refused to accept the defendants' offer of £100 sterling per package.

Held: (1) the defendants were entitled to tender payment of the damages in pounds sterling;

(2) as the court could give judgment in a foreign currency, there was no need to invoke art. IX;

(3) "£100" in art. IV r. 5 did not mean "£100 gold".

Cases referred to:-

(1) *Miliangos* v. *George Frank (Textiles) Ltd.* [1976] A.C. 443.

(2) *Schorsch Meier G.m.b.H.* v. *Hennin* [1975] Q.B. 416.

(3) *Federal Commerce and Navigation Co. Ltd.* v. *Tradax Export SA (The Maratha Envoy)* [1977] 2 All E.R. 41.

(4) *The Folias* [1979] 1 All E.R. 421, 430.

(5) *Woodhouse AC Israel Cocoa Ltd. S.A. & Anor.* v. *Nigerian Produce Marketing Ltd.* [1971] 1 All E.R. 665.

ADMIRALTY *IN REM.*

Karuppan Chettiar (*Dr. Myint Soe* with him) for the plaintiffs.

Judith Prakash (*Mrs.*) for the defendants.

Cur. Adv. Vult.

Sinnathuray J.: In this admiralty *in rem* action, the plaintiffs claim damages from the defendants, the owners of the ship "Vishva Pratibha" of the Port of Bombay, India, for breach of contract or duty, and/or negligence in the carriage of 31 packages of handloom cotton lungies of the plaintiffs on board the said ship under a bill of lading dated November 26, 1973 from the Port of Madras to the Port of Singapore.

At the hearing, the defendants admitted liability for 16 packages. As to 14 of them, they claimed limitation of liability of £100 sterling each under the Carriage of Goods by Sea Act (the Act) (Cap. 184). As to the remaining two packages, the parties were agreed in the equivalent of Singapore dollars of Indian rupees 1,737 and 25 pice as the damages to the packages were below the limit of liability under the Act. It is common ground that the Act applied to the carriage of the particular goods. Two Articles in the Act call for consideration. One is Article IV rule 5, the relevant portion of which reads as follows: —

"5. Neither the carrier nor the ship shall in any event be or become liable for any loss or damage to or in connection with goods in an amount exceeding £100 per package or unit, or the equivalent of that sum in other currency. . . ."

The other is Article IX which reads thus:

"The monetary units mentioned in these Rules are to be taken to be gold value."

The difficult question canvassed at the hearing was: What is the value of "£100" in Article IV rule 5? For the plaintiffs, it was contended by reference to Article IX that it meant "£100 gold". For the defendants, it was submitted that by tendering to the plaintiffs, as they had done, £100 sterling per package, they had fully discharged their liability for the 14 packages. The plaintiffs refused to accept the tender. They demanded payment of £100 in sovereigns per package, or its equivalent value in Singapore dollars as at the date of the cause of action.

Along with the question raised was another one: Can the court give judgment in a currency other than in Singapore dollars? For the defendants, the submission was that as there is no exchange control in Singapore, the court can give judgment in any currency be it pounds sterling or United States dollars but not in gold. And, as the contract stipulates the liability for damages in a foreign currency, pounds sterling, this court can give judgment in that currency. In support of the submission, Mrs. Prakash for the defendants, relied on the famous decision of the House of Lords in *Miliangos* v. *George Frank (Textiles) Ltd.*[1]

When will an English Court give judgment in a foreign currency? In *Miliangos'* case, a Swiss seller in 1971 sold goods to an English buyer at a price expressed in Swiss francs. The proper law of the contract was Swiss law. The goods and invoices were delivered but the price was not paid. In 1972 the seller sued the buyer in England for the price. He claimed the sums due in Swiss francs converted into sterling at the breach date. Later, having regard to the Court of Appeal decision in *Schorsch Meier G.m.b.H.* v. *Hennin*[2] that the rule that English courts could give money judgments in sterling should be discarded and that judgments should be given in the currencies of foreign countries when the foreign currency was that of the contract and the money of payment, the seller amended his pleadings and asked for judgment in Swiss francs as an alternative to claiming judgment in sterling. The case went to the House of Lords which held, *inter alia,* that an English court was entitled to give judgment for a sum of money expressed in a foreign currency in the case of obligations of a money character to pay foreign currency under a contract, the proper law of which was that of a foreign country, and when the money of account was that of that country or possibly some country other than the United Kingdom (see headnote to the case).

Next, *Federal Commerce and Navigation Co. Ltd.* v. *Tradax Export S.A. (The Maratha Envoy)*[3] extended the *ratio decidendi* of the *Miliangos'* case. The claim was for demurrage. Under the charter the demurrage was payable in U.S. dollars. The proper law of the charter was English law. The Court of Appeal held that judgment should be given in U.S. dollars. Stephenson and Shaw L.JJ. agreed with the reasons given by Lord Denning who said:

"There is, however, a point to be considered. It arises because of the very limited way in which Lord Wilberforce expressed his opinion in *Miliangos* v. *George Frank (Textiles) Ltd.* He went no further (at that stage) than to say that the power (to give judgment in a foreign currency) extended to —

'obligations of a money character to pay foreign currency arising under a contract whose proper law is that of a foreign country and where the money of account and payment is that of that country, or possibly of some other country but not of the United Kingdom.'

. . . .

I think that the power should not be so confined. Once it is recognised that judgment can be given in a foreign currency, justice requires that it should be given in every case where the currency of the contract is a foreign currency; otherwise one side or the other will suffer unfairly by the fluctuation of the exchange. . . . So I would hold that in contracts where the currency of the contract is a foreign currency, but the proper law of the contract is English law, the court can and should give judgment in the foreign currency: and this both when it is for a debt due under the contract (as demurrage) or damages for breach of contract (as of the implied term.)"

In *The Folias,*[4] Lord Wilberforce in the House of Lords labelled the above *Maratha Envoy* case as a decision "on the 'currency of the contract' and correct on that basis". As I understand then, the law in

England is the courts there will give judgment in a foreign currency, though the proper law of the contract is English law, in the 'currency of the contract' of the parties, be it a claim for a liquidated sum or for damages.

I adopt and apply that rule to the facts of the present case. As I have said, the proper law of the contract of the parties is Singapore law. (See: Clause Paramount and the Clause relating to Jurisdiction in the bill of lading AB97.) Under the Act, the limitation of liability of the contract is £100. Putting aside the first question to be considered, the 'currency of the contract' is in pounds sterling. Therefore, the defendants were entitled to tender payment of the damages in pounds sterling, and this court can give judgment in that currency.

There was a submission for the plaintiffs I have yet to refer. There are two aspects to it. One was the authorities show, in every claim where judgment was given in foreign currency, the plaintiff had either specifically claimed in a foreign currency, or, by express or implied consent of the claimant, the judgment was in foreign currency. This situation has come about as a result of the fluctuation in recent years of the pounds sterling. As I view it, what is sauce for the goose is sauce for the gander. Just as a plaintiff can seek judgment in a foreign currency, I can see no possible reason why a defendant too may not, where the rate of exchange is to his benefit, submit to judgment, in a foreign currency, provided always that the currency of the contract is in that particular currency.

The other aspect of the submission was that the plaintiffs are not claiming in a foreign currency. I do not agree. The claim of the plaintiffs is that under the contract they are entitled to £100 per package in gold value. Assuming that gold is 'currency', which I will deal with later (and leaving aside the first question) their claim is in foreign currency. The defendants are therefore entitled to have judgment entered against them in foreign currency.

There was yet another submission for the plaintiffs. It was said to arise on the facts. It was that the currency of account was Indian rupees, that the currency of payment was Singapore dollars, and therefore the currency of loss must be in Singapore dollars. Also, as the proper law of the contract is Singapore law, the plaintiffs are entitled to judgment in Singapore dollars.

It was in *Woodhouse AC Israel Cocoa Ltd. S.A. & Anor.* v. *Nigerian Produce Marketing Co. Ltd.*[5] that Lord Denning M.R. at pages 667 and 668 explained the difference between 'money of account' and 'money of payment'. He said:

"... the money of account is the currency in which an obligation is measured. It tells the debtor how much he has to pay. The money of payment is the currency in which the obligation is to be discharged. It tells the debtor by what means he is to pay."

When the money of account and the money of payment are in the same currency, no problem arises. But, when they are in different currencies, in a floating exchange rate, or where there is devaluation of one, there can be a loss of money which can be crucial to one of the parties.

As for the submission, with respect to counsel, it has no application to the facts. This is not a case of a contract of sale of goods, as in the *Woodhouse* case, of sale of cocoa between a Nigerian seller and an English buyer where the money of account was in Nigerian pounds and the money of payment in pounds sterling which gave rise to a dispute between the parties. Nor is this a case of a dispute relating to freight where the money of account for the freight was in U.S. dollars (not as was submitted in Indian rupees) and the money of payment for the freight which had been paid was in Indian rupees, for then the submission as put forward would be relevant. The claim is for damages arising from the contract of carriage of the plaintiffs' goods on the defendants' ship. There is no issue relating to money of account and money of payment. The issue is on the construction of an Article in the Act relating to limitation of liability for the carriage of goods. The submission is therefore out of place.

I finally come to the very difficult question: what is the value of "£100" in the Act? The plaintiffs called a witness, Mr. Wu Juay Chong, an officer from the Economics Department of the Monetary Authority of Singapore. He gave evidence of prices of gold in Troy ounce in Singapore dollars on certain dates in 1973, the year of the cause of action of the plaintiffs. His evidence is not useful. He was unable to give the value of a sovereign. As regards that, he said: "We don't have value of gold sovereigns. I don't know in Troy ounce, how much gold there is in a gold sovereign." That being the outcome of his evidence, the submission that "£100" means "£100 gold" or "100 sovereigns" is academic as judgment in a claim for damages must be given in money, in some currency. 'Currency' is defined as something that is in circulation as a medium of exchange including coins, government notes, and bank notes (See: *Webster's* Dictionary). Gold does not come within the definition. It is not money. It is not currency. It is a commodity. And in these days a very precious commodity. Also, I shall show later sovereigns too are not currency. So then, this is the first difficulty.

Besides that there are others which have not been resolved by any court in any of the Commonwealth countries. Counsel for the plaintiffs assumed that £100 in Article IV rule 5, means "£100 gold". It stems from the fact that the only reference to a monetary unit in the rules is in Article IV rule 5, and therefore the reference to gold value in Article IX must be "£100" in gold value. I am not satisfied that such an assumption is valid.

To begin with, it is curious how Article IX came to be in the Act. Our Act, the Carriage of Goods by Sea Act, was introduced into the then Colony of Singapore by the Carriage of Goods by Sea Ordinance 1927 (Ordinance No. 4 of 1927) in April 1927. It is identical to the Carriage of Goods by Sea Act 1924 of the United Kingdom which was enacted on 1st of August 1924. Its preamble states (as does ours) that it is based on the draft Convention agreed at Brussels

in October 1922, as amended at Brussels in October 1923. That draft did not contain Article IX. The final Convention signed on 25th of August 1925 does. It, however, states as follows:

"The monetary units mentioned in this convention are to be taken to be gold value.

Those contracting States in which the pound sterling is not a monetary unit reserve to themselves the right of translating the sums indicated in this convention in terms of pound sterling into terms of their own monetary system in round figures.

The national laws may reserve to the debtor the right of discharging his debt in national currency according to the rate of exchange prevailing on the day of the arrival of the ship at the port of discharge of the goods concerned."

The strange circumstance I have referred to above has not been commented upon, as far as I know, by any writer of text books. The commentaries, however, in three books of reference are these: "the construction of this Article is difficult" (See: *Scrutton* on Charterparties 18th Edition page 449); it "is very confusing and unsatisfactory" (See: *Tetley* on Marine Cargo Claims 1st Edition page 240); and *Carver* on Carriage by Sea 12th Edition Vol. 1 at page 264 at paragraph 307 puts it thus: "Article IX of the Schedule to the British Act is, on any view, most unhappily phrased. Article IX of the Convention was surely never intended to be included — in whole or in part — in municipal legislation (See, e.g. the Canadian and American Acts of 1936, the French law of that year and the New Zealand Act of 1940, in which no such provision is made) and the problem could easily and satisfactorily be solved by the repeal of Article IX of the Schedule." Moreover, in the absence of any interpretation by the courts, writers have conflicting views on the effect of Article IX on Article IV rule 5.

In my view, Article IX in the Act is not a practical provision. It states: "The monetary units mentioned in these rules are to be taken to be gold value." There is no reference in it to what 'gold value' is. It does not give the weight and fineness of the gold. Nor is there reference in Article IX to 'gold value' as 'pound sterling gold' (sovereign) to relate it to Article IV rule 5. A 'sovereign' is a British gold coin having 123.274 grains of gold .9166 fine nominally worth one pound sterling (See: *Webster's* Dictionary). I say nominally worth because the issue of gold coins was suspended in 1925 (See: Section one of the Gold Standard Act 1925: *Halsbury's* Statutes of England, 3rd Edition, Vol. 2 page 755); and, in 1931 the United Kingdom went off the gold standard. By the Gold Standard (Amendment) Act, 1931, the Bank of England was discharged of its "obligation expressed in terms of sterling in gold of a given fineness or by reference to the relation between sterling and gold." (See: *Halsbury's ante* at page 760.) Sovereigns ceased to be currency. The position since the Second World War is that the national currencies of the member States of the International Monetary Fund, of which Singapore is a member, is managed independent of gold.

There is no doubt that Article IX has created difficulties. In the United Kingdom shipowners and underwriters have long abandoned it. Many of them have become parties to The British Maritime Law Association Agreement of 1st of August 1950 where there is the so-called Gold Clause. The parties to the Agreement, on the assumption that '£100' means '£100 gold', substituted '£100 gold' for '£200 sterling lawful money of the United Kingdom' (See: Appendix 7 *Scrutton* on Charterparties page 528). As regards our law, the matter is now governed by the Carriage of Goods by Sea Act, 1972, which came into operation on 16th of January 1978. Under Article IV rule 5(a) of this Act, the limitation of liability is now "10,000 francs per package or unit or 30 francs per kilo of gross weight"; and, under paragraph (d) thereof "A franc means a unit consisting of 65.5 milligrammes of gold of millesimal fineness 900."

Be the law as it is which is not applicable to the present case, even if I am wrong that Article IX is nugatory, and effect has to be given to it, I accept the submission for the defendants that as the courts can give judgment in a foreign currency, there is no need to invoke Article IX. There is support for this submission in *Scrutton* (*ante* at page 449) where it is said that it is fully arguable 'gold value' in Article IX is only relevant when it is necessary to convert £100 to "the equivalent of that sum in other currency" (See Article IV rule 5 for the words in quote). *Carver* (*ante* at page 264) puts the argument thus:

"It would only appear relevant, in fact, to 'take' the 'gold value' (or any value other than £100) of £100 where there is a question of converting the £100 into another currency. How can the words of Article IX operate to give an unnatural meaning to the perfectly plain expression '£100' in Article IV, r. 5, where no question arises of converting that amount into any other currency? For, if '£100' is to be taken at a gold value, is not the equivalent, in pounds, of that gold value necessarily '£100'? One must necessarily end up in pounds — not sovereigns — and it is logically difficult to spell out the words of Article IX that '£100' in Article IV. r. 5, is to be read as 'the number of pounds which will buy 100 sovereigns'."

On the first question then, Article IV rule 5 refers to 'currency', and effect must be given to the natural and ordinary meaning of it which I have given. It can also be given as "money in actual use in a country" (See: *Concise Oxford Dictionary*). I have also, I think, sufficiently demonstrated that neither 'gold' nor 'sovereign' is 'currency'. Therefore, either of them does not arise for consideration in the construction of Article IV rule 5. As regards Article IX, for the reasons I have given, it is otiose. Leaving aside the mystery of how it got into the municipal law in the form it is, I agree with *Carver* that it should not have been incorporated into it. I also agree with *Carver* that it should have been repealed. I hold that "£100" in Article IV rule 5 does not mean "£100 gold".

There is one other matter. The plaintiffs claim interest at the rate of 8% from 1st to March 1974 to the date of payment. It is not resisted by the defendants. There will accordingly be judgment for the plaintiffs for £1,400 or its equivalent sum in Singapore dollars as at the date of judgment together with interest at 8% from the 1st of March 1974 to the date of payment. In the circumstances of this case, there will be costs for the plaintiffs.

Order accordingly.

Solicitors: *Murphy & Dunbar; Drew & Napier.*